

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(10)S
Sales Tax
February 14, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070621A

On June 21, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from MP Sports Club Upper Eastside LLC, 172 Tremont Street, Third Floor, Boston, MA 02111. Petitioner, MP Sports Club Upper Eastside LLC, provided additional information with respect to the Petition on November 7, 2007.

The issue raised by Petitioner is whether various charges to its members and others are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner, doing business as The Sports Club/LA-Upper East Side, is a health club that provides a variety of fitness and participant sporting activities at its facilities at 330 East 61st Street in New York City. Petitioner offers traditional cardiovascular and weight-training equipment such as treadmills, bikes, stair climbers, rowing machines, and Nautilus machines. Additionally, the facility has squash, basketball, volleyball, and indoor soccer courts; yoga, pilates, boxing, and group-cycling studios; a swimming pool; a rock-climbing wall; and various classes available to members.

Petitioner charges an initiation fee and monthly membership dues for the use of its facility. Members must pay additional fees for special services, such as personal training, sports lessons, and spa sessions. The members do not possess any proprietary interest in Petitioner and do not control social or athletic activities or participate in the selection of members or management of the club. The number of members is restricted solely due to the physical size of the facility.

It was previously determined that charges for the use of this facility were not subject to tax as dues to an athletic club under section 1105(f)(2) of the Tax Law and that the facility was not a weight control salon, gymnasium, or other establishment described in section 11-2002(h) of the Administrative Code of the City of New York. (See *Pontius Realty, Inc.*, Adv Op Comm T&F, May 31, 2000, TSB-A-00(26)S). Petitioner states that the facts as submitted for the previous Advisory Opinion are still representative of the manner in which it conducts its business.

The various services that Petitioner provides to its members for additional charges are described as follows:

- Personal Training- Petitioner, for additional fees, offers personal training sessions either on a one-on-one basis or as group sessions. Sessions are sold either individually or in packages of multiple sessions.
- Fitness and Wellness Workshops- In addition to personal training, for additional fees Petitioner offers a myriad of specialized workshops, such as triathlon training workshops, yoga and pilates workshops, and stretching.
- Sports Leagues- Petitioner, for additional fees, also has sports leagues, such as basketball and soccer leagues, open to members and nonmembers who pay to join the league during a season.
- Private Sports Lessons- Petitioner also, for an additional fee, offers lessons and clinics in a variety of sporting activities including boxing, running, volleyball, martial arts, swimming, basketball, soccer, and racquet sports.
- Guest Fees- When nonmembers visit Petitioner's club, Petitioner charges a flat guest fee for each visit.
- Miscellaneous Charges- Petitioner charges a fixed amount for inconvenience and administrative cost to replace lost membership cards and lost locker keys. Members are required to surrender their membership cards and any locker keys upon cancellation of membership.
- Child Care- Petitioner, for a fee, provides temporary child care to members who are using the club.
- Child Care Programs- In addition to the child care described above, for an additional fee Petitioner offers a variety of classes, clinics, camps, and programs for children.
- Spa Services- Petitioner, for a fee, offers a variety of spa treatments, including massage, facials, manicures, and body treatments performed by professional, non-medical personnel.
- Locker Fees- Petitioner, for a fee, allows members the opportunity to rent lockers where they can store personal items.

Applicable law and regulations

Section 1105(c) of the Tax Law imposes sales tax, in relevant part, on:

The receipts from every sale, except for resale, of the following services:

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

Section 1105(f) of the Tax Law imposes sales tax, in relevant part, on the following:

(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state . . . except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . .

(2)(i) The dues paid to any social or athletic club in this state if the dues . . . are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. . . .

Section 1107(a) of the Tax Law provides, in part:

General. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes . . . which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1212-A(a)(2) of the Tax Law authorizes New York City to impose a local sales tax at the same uniform rate on "beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities . . . but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law;" such tax to be administered and collected by the Commissioner of Taxation and Finance.

Section 11-2002(h) of the Administrative Code of the City of New York (New York City Administrative Code) imposes sales tax, in part, on:

Receipts from beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities. . . .

Section 527.10(d)(4) of the Sales and Use Tax Regulations provides, in part:

Charges to a patron to or for the use of sporting facilities or activities in which the patron is to be a participant are excluded from tax.

Section 527.11(b) of the Sales and Use Tax Regulations provides, in part, the following definitions of terms that are contained in section 1105(f)(2) of the Tax Law:

(2)(ii) Dues do not include any charge for sports privileges or facilities paid by a member for his guest when such charge if paid directly by the guest would be exempt.

Opinion

Petitioner charges members an initiation fee and monthly fees, for use of its facilities, and Petitioner also offers special services for additional fees.

Section 11-2002(h) of the New York City Administrative Code imposes a local sales tax on the receipts from every sale of services by weight control salons, health salons, gymnasiums, Turkish and sauna baths, and similar establishments and every charge for the use of such facilities. Petitioner's fees provide access to a variety of sporting activities and facilities for its members. Consequently, Petitioner's facility is not a weight control salon, gymnasium, or other establishment as described in section 11-2002(h) of the New York City Administrative Code. See *Pontius Realty, supra*. Therefore, the fees charged by Petitioner for the services of personal training, fitness and wellness workshops, sports leagues, private sports lessons, guest fees, child care, and child care programs as described in this Opinion are not fees subject to the New York City tax on the use of, and services provided by, a weight control salon, gymnasium, etc. pursuant to section 11-2002(h) of the New York City Administrative Code. Section 11-2002(h) of the New York City Administrative Code also imposes local sales tax on the receipts from beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage and similar services. Since Petitioner's services are not similar to the enumerated services subject to tax pursuant to section 11-2002(h) of the New York City Administrative Code, the fees charged by Petitioner for such services are not subject to tax pursuant to such section 11-2002(h).

Not being a social or athletic club (as previously determined in *Pontius Realty, supra*) the fees for these additional services are not dues subject to sales tax pursuant to section 1105(f)(2) of the Tax Law. Such services are also not included within the enumerated services taxed under section 1105(c) of the Tax Law, and, therefore, are not subject to tax pursuant to that section. See *William A. Barrett*, Adv Op Comm T&F, October 9, 2003, TSB-A-03(38)S; *Dr. Joan Coff*, Adv Op Comm T&F, May 26, 2005, TSB-A-05(17)S; *Dianne C. Hoffman, C.P.A.*, Adv Op Comm T&F, December 27, 1993, TSB-A-93(64)S.

To the extent that the guest fees and sports league fees are admissions to or for the use of a facility for sporting activities, since the members or guests are participants in such activities, the charges for such admission are excluded from sales tax pursuant to section 1105(f)(1) of the Tax Law. (See also section 527.10(d)(4) of the Sales and Use Tax Regulations; and *Country Club Partners, LLC*, Adv Op Comm T&F, May 30, 2006, TSB-A-06(15)S).

Miscellaneous charges for lost membership cards and locker keys are separate charges to cover the cost of replacement of such items and are considered to be an indemnification to Petitioner for the loss of the membership cards and locker keys. These fees are not for the sale of tangible personal property by Petitioner to its members and, therefore, are not subject to sales tax. It should be noted that Petitioner would be required to pay sales tax on its purchases of the membership cards and locker keys. See *Pro Net, Inc.*, Adv Op Comm T&F, October 2, 1991, TSB-A-91(65)S.

Locker fees paid by members to rent lockers where they can store personal items are subject to State and local sales taxes pursuant to section 1105(c)(4) of the Tax Law. See *Country Club Partners, LLC, supra*.

Spa services such as massage, facials, manicures, and body treatments performed by persons who are not medical professionals are not included within the services taxed under section 1105(c) of the Tax Law, and the receipts from such services are not subject to the New York State sales tax. However, the receipts from these spa services are subject to New York City sales tax provided for in section 1212-A of the Tax Law and section 11-2002(h) of the New York City Administrative Code. It is noted that massage services that are provided by a physiotherapist, chiropractor, podiatrist, osteopath, or any person authorized to practice medicine and licensed under Title VIII of the Education Law may be excluded from New York City sales tax if the services are medical in nature and similar to the services provided by the categories of professionals enumerated in section 1212-A of the Tax Law and section 11-2002(h) of the New York City Administrative Code. However, the massage services provided by Petitioner are not medical in nature and do not qualify for such exclusion, and thus are subject to the New York City sales tax. See *Carapan, Inc.*, Adv Op Comm T&F, June 21, 1993, TSB-A-93(40)S; *Whitestone Services, Inc.*, Adv Op Comm T&F, February 28, 1996, TSB-A-96(12)S.

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It should be noted that other than the application of sales tax to those fees or charges specifically addressed herein, this Opinion makes no representation as to other fees or charges that Petitioner may receive from its members.

DATED: February 14, 2008

/s/
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.